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# Metropolitan Investment Co. v. Jerry Sine and Dora T. Sine : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Brant H. Wall; Jackson B. Howard; Howard and Lewis; Attorneys for Plaintiff-Respondent; Richards, Bird and Hart; Attorneys for Appellants;

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**IN THE SUPREME COURT**

**of the  
STATE OF UTAH** FILED

FEB 1 - 1963

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Clerk, Supreme Court, Utah

**METROPOLITAN INVESTMENT  
COMPANY, a Partnership composed  
of W. ADRIAN WRIGHT, W.  
MEEKS WIRTHLIN, and A. P.  
NEILSON,**

*Plaintiff-Respondent,*

**vs.**

**JERRY SINE and DORA T. SINE,  
his wife,**

*Defendants-Appellants.*

Case No.  
9622

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**RESPONDENT'S PETITION FOR REHEARING AND BRIEF  
IN SUPPORT THEREOF**

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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METROPOLITAN INVESTMENT COMPANY, a Partnership composed of W. ADRIAN WRIGHT, W. MEEKS WIRTHLIN, and A. P. NEILSON, <i>Plaintiff-Respondent,</i>	}	Case No. 9622
vs.		
JERRY SINE and DORA T. SINE, his wife, <i>Defendants-Appellants.</i>	}	

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RESPONDENT'S PETITION FOR REHEARING AND BRIEF  
IN SUPPORT THEREOF

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PETITION FOR REHEARING

COMES NOW METROPOLITAN INVESTMENT COMPANY, Plaintiff and Respondent herein, and respectfully petitions this Honorable Court for a rehearing in the above-entitled case, and to vacate the Order of this Court herein reversing the judgment for Respondent with instructions to the trial court to write findings in accordance with the opinion of this Honorable Court.

This Petition is based on the following grounds:

**POINT I**

**THIS COURT INCORRECTLY DETERMINED THIS TO BE A CASE IN EQUITY AND THAT THE FINDING OF THE TRIAL COURT MUST BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

**POINT II**

**THIS COURT ERRORED IN FAILING TO FIND THAT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT WERE SUPPORTED BY COMPETENT AND ADEQUATE EVIDENCE.**

**BRANT H. WALL and JACKSON B. HOWARD**  
**Attorneys for Plaintiff and Respondent**

**BRIEF IN SUPPORT OF PETITION FOR  
REHEARING**

**POINT I**

**THIS COURT INCORRECTLY DETERMINED THIS TO BE A CASE IN EQUITY AND THAT THE FINDING OF THE TRIAL COURT MUST BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

The opinion rendered by this Court is predicated upon the following statement in its decision:

“The facts which the trial court found in support of the nullification of the restrictive covenant are facts which require clear and convincing evidence to support such findings.<sup>1</sup> This is an equity case in which we review the trial court’s findings of fact but overturn them only where it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of the evidence.”<sup>2</sup>

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1. See *Child v. Child*, 8 Utah 2d 261, 332 P. 2d 981.

2. See Constitution of Utah Article VIII, Sec. 9; *O’Gara v. Findlay*, 6 Utah 2d 102, 306 P.2d 1073.”

We believe this statement and rule to be contra to the established law and prior holdings of this Court, as the rule heretofore established and announced by this Court is that an action to quiet title is an action at law and is not an action in equity and hence the scope of review is limited. In support of this proposal and rule, we cite the following:

In *Babcock v. Dangerfield*, 98 Utah 10, 94 P.2d 862, this Court held:

“ \* \* \* It is clear from the pleadings in this case that the action is one at law and therefore that a jury trial should have been granted. *Bolognese v. Anderson*, Utah, 90 P.2d 275. See also *Norback v. Board of Directors*, 84 Utah 506, 37 P.2d 339.”

The above case was cited with approval in *Dahnken v. George Romney & Sons Co.*, 111 Utah 471, 184 P.2d 211.

In *Buckley v. Cox*, 122 Utah 151, 247 P.2d 277, in an action by the Plaintiff to quiet title to a driveway in herself, the Defendant claimed that the driveway was appurtenant to his land and claimed to own it, this Court held:

“Under the criteria set out in *Norback v. Board of Directors*, 84 Utah 506, 37 P.2d 339, this action is one at law. Hence, if there is any competent evidence in the record to support the court’s findings, the judgment should not be disturbed. *Brown v. Union Pac. R. Co.*, 76 Utah 475, 290 Pac. 759; *Jenkins v. Stephens*, 64 Utah 307, 231 P. 112. This principle is well stated in *Jensen v. Gerrard*, 85 Utah 481, 39 P.2d 1070, 1072: ‘As this is a law action, the question is not whether the evidence would have supported the decision in favor of the appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent credible evidence to support the findings made by the trial court, then those findings should stand.’ ”

In *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250, this Court cited the case of *Babcock v. Dangerfield*, supra, for the holding that an action to quiet title is an action at law, and made the following discussion on page 252 Pac. 2d.:

“We are further of the opinion that although historically an action to quiet title was originally equitable and the law courts had no jurisdiction to grant such relief, that situation does not prevail in this state. Formerly the equity courts afforded relief because there was no adequate remedy at law. In this jurisdiction, however,



there is an adequate remedy provided by statute under the provisions of Chapter 40 of Title 78, U.C.A. 1953. Likewise in this state the distinctions between law and equity actions have been abolished by Article VIII, Section 19 of the Constitution of Utah."

And on Page 253 P. 2d:

"In the case of Buckley v. Cox,<sup>3</sup> Plaintiff brought an action to quiet title in a driveway in herself and to enjoin the Defendants from further use of the same. This court speaking through Mr. Justice McDonough in an unanimous opinion held that the action was one at law."

The case before this Court involves an action to quiet title to a parcel of real property and the pleadings by the Plaintiff follow the provisions of 78-40-1, etc., Utah Code Annotated, 1953. Both parties have treated and recognized this as such an action, but in many instances have cited to this Court decisions from other jurisdictions, wherein the action is considered to be one in equity and hence certain equitable principles have been cited to the Honorable Court. However, the decision by this Court completely reverses the above cited Utah cases without referring to the decisions or recognizing their effect and weight.

We readily concede that the requirement of proof by "clear and convincing evidence" as announced in the decision of this Court is well settled and recognized in this jurisdiction in actions involving suits to cancel or reform a written instrument or actions founded upon fraud, deceit or mistake, and in support of this we cite

the following cases: See *Child v. Child*, 8 Utah 261, 332 P.2d 981; *Gray v. Gray*, 108 Utah 390, 160 P.2d 432, and *Hansen v. Mutual Finance Corporation*, 84 Utah 579, 37 P.2d 782.

We respectfully wish to emphasize and point out to this Court that the matter now submitted for review does not involve any of the foregoing issues and therefore the rule announced requiring that the proof and evidence be sustained by clear and convincing evidence should not be the rule or the degree of evidence in actions such as the one now before this Court. We submit that there is no evidence in the record or allegation of fraud, mistake, deceit nor of attempt to cancel or reform any written instrument. The restrictive covenant, as imposed and dictated by the Appellants, constituted a cloud upon the title of the subject property and the only issue for the trier of facts was to determine the validity of same. We respectfully submit that the evidence is sufficient under applicable rules of evidence to sustain the findings and judgment that appellants have no right, title or interest in and to the subject property. We cite for the consideration of this Honorable Court in support of the foregoing the following:

In *Buckley v. Cox*, this Court held:

“The evidence as revealed by the record is conflicting. It is sufficient to support a decision for either party. The trial judge saw and heard all the witnesses and viewed the exhibits. He found that the use by Defendant was permissive and not adverse. Since competent evidence in the

record supports the court's findings and judgment, we may not disturb the latter. See cases *supra*."

In *Green v. Equitable Life Assurance Society of the United States*, 3 Utah 2d 375, 284 P.2d 695, this Court made the following determination:

"This being a law action the question is not whether the evidence would have supported a judgment in favor of Appellant but whether the judgment entered by the trial court finds support in the evidence."

We therefore respectfully submit that the decision should be reviewed in the light of the prior holdings of this Court and that the proper consideration be given to the weight of the evidence and the matters which are reviewable by the appellate court.

## POINT II

**THIS COURT ERRORED IN FAILING TO FIND THAT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT WERE SUPPORTED BY COMPETENT AND ADEQUATE EVIDENCE.**

A. There is adequate evidence in the record that there has been a substantial change in the neighborhood and that the change which has occurred is such as to vitiate and render ineffective the restrictive covenant involved in this action.

At the time the restriction in question was imposed in 1956, it is recognized by all parties to this action that the area was composed of a few motels, sub-standard housing, and some commercial business, but from that date to the date of trial, a large number of motels has been constructed along the street (R. 27, 28, 29, 30, 21, 102, 107). The Appellants now concede and admit the change in the neighborhood and endeavor to justify their position by stating that the development and change in the neighborhood is nothing more than the change and development that was contemplated by the parties, that such change was already in progress in 1956, and that the street along which the subject property is located is now described as "motel row." We are therefore confronted with an issue of fact relative to change in neighborhood which was submitted to the trier of facts and after due consideration and weighing of the evidence and testimony, the trial court made findings in support of the Respondent's position, which findings we believe are supported by adequate and competent evidence.

B. The purposes and objects of the restrictive covenant herein involved have been nullified and defeated.

We quote from the Appellants' Brief on pages 3 and 4 as to the purpose for which the restrictive covenant was imposed:

"Mr. Jerry Sine was cognizant of the fact that A. P. Neilson was interested in motel properties,

and he was not willing to sell the subject property to anyone who intended to use it in conjunction with other properties to construct a large motel. His motive for preventing a motel from being constructed on the subject property was to protect his motel business conducted as Se Rancho and Scotty's Romney. \* \* \* If a large motel was erected, in part, on the subject property, Appellant feared that the business of Se Rancho and Scotty's Romney would be adversely affected. Guests, especially those traveling from the North and South and turning onto North Temple Street, would be diverted into such motel to the detriment of Se Rancho and Scotty's Romney situated to the West thereof. (R. 5, 52, 68, 79, 90, 99, 100)."

We quote from the Letter submitted by counsel for Appellants dated October 10, 1962, to the Honorable Judges of the Supreme Court. On page 3 thereof the following is stated:

" \* \* \* It is true that the Appellant testified that whether or not the six units which could be built on this particular property were built would not be substantial (R. 6). But there is no evidence that that was ever within the contemplation of the Appellants. The reason for the restriction, as testified by Mr. Sine, was that an impressive front along North Temple Street could not be built without this property, which would be a substantial thing, and he also testified that this would have a substantial effect upon his business" (R. 91, 100, and 105; see also R. 40).

We submit that the language of the Appellants as cited above clearly demonstrates that the sole pur-

pose for the restrictive covenant was to prevent the construction of a large motel on North Temple Street between 2nd and 3rd West which might compete with the business properties of the Appellants. The purpose and object of the restrictive covenant was obviously not to prevent the construction of the motel upon the small parcel of land involved in this action, which Appellants readily admit could not be utilized for motel purposes of any consequence or which would interfere with the Appellants' business endeavors. The cardinal fact which must be recognized by this Court is that a large and impressive motel is to be constructed upon the properties surrounding the subject property notwithstanding the outcome of this litigation (R. 96 and Exhibit 9). We submit that the Appellants have admitted on page 14 of their Brief that the surrounding property could be used for a large and impressive motel development even without the use of the subject property. Appellants' obvious purpose and object was to prevent the construction of a large and impressive motel on the surrounding land which they did not own nor have any right to control, and consequently, with the construction of the motel by Western Travel, Inc., of approximately 130 units, there appears to be no valid or subsisting reason to continue the existing restriction because it no longer has any usefulness nor is it capable of serving the purpose for which it was intended. Since the area has changed from sub-standard housing and light commercial district to a street now described as "motel row," and the change has in effect

rendered the restriction of no value to the Appellants, the findings of the trial court were entirely consistent with and supported by the evidence and did not constitute any abuse of discretion or misapplication of the evidence, or the law.

C. The trial court found that for the reasons hereinabove stated, the restrictive covenant would not confer any benefit upon the Appellants but would constitute only a detriment to the Respondent and hence determined that the restrictive covenant should be given no further force and effect. In the decision rendered by this Honorable Court, it is there stated as the well-recognized rule of law that:

“We agree that there is no reason for continuing the restriction unless there is a benefit to be realized by the Defendants. Restrictive covenants will not be enforced where enforcement is no longer of general usefulness, nor capable of serving purpose for which restriction was imposed,<sup>6</sup> or reason of restriction has ceased.”<sup>7</sup>

6. *Osius et al, v. Barton, et al.* (Florida, 1933) 147 So. 862.

7. See also *Clark on Covenants and Interests Running With Land*, pp. 163-165. Dean Pound discussion on Covenants, 33 *Harvard Law Review*, beginning at p. 171.”

The Appellants failed to take an appeal from the foregoing finding and the argument of “impressive front” as advanced by them in their letter argument of October 10, 1962, *supra*, which was filed after the oral argument in this matter and to which Respondent was not given an opportunity to rebut, constitutes nothing more than a fanciful conclusion on the part of the

Appellants. To say that an impressive front cannot be constructed on North Temple Street without utilizing the subject property is clearly without support and is refuted by the fact that Western Travel, Inc., contemplates the construction of a large motel along said street with an impressive front whether the small parcel of land, the subject of this litigation, is included or not. We invite the Court's attention to the fact that the improvements previously located upon the parcel of land herein in question have been razed and that the land is cleared (R. 31, 106, 107), and therefore to contend that there is any diminution in the attractiveness of the front is merely indulging in argument as to what may appeal to the esthetic sense of different individuals and in any event, is not manifest in the record by any such clear and convincing evidence as would justify or warrant overturning the finding of the trial court in this regard. Hence, it can be argued and concluded just as logically that the proposed new motel will be designed with a front just as impressive with or without utilizing the parcel of property herein involved as a part of the area upon which the motel is to be constructed.

The testimony of the architect was to the effect that the plans of the motel could be redesigned to delete the construction of any motel units upon the subject parcel of land but that it would present some problems with respect to re-aligning and re-routing underlying water, sewer, and other utilities (R. 72, 73).



We respectfully submit that under any theory the retention of the restrictive covenant will fail to confer any reasonable benefit upon the Appellants, that its purpose and function has been completely thwarted and ruled ineffective, that its retention will not preclude the construction of the large motel development, nor will it preclude the construction or design of an impressive front as suggested by this Court in its decision. We submit that the retention of the covenant will at best constitute a harrassment and detriment to the Respondent and confer no benefit upon Appellants as found by the trial court.

D. This Court in its decision upsets the findings of the lower court to the effect that the restrictive covenant was personal to A. P. Neilson and that it had lapsed by the expiration of reasonable time.

The trial court heard the witnesses and had the opportunity to observe their demeanor on the witness stand. Where the evidence is conflicting, the appellate court should affirm the findings of the trial court. In such circumstances, the trial court is entirely justified in disbelieving the testimony of the witness for the Appellants and giving credence to the testimony offered by the witness for Respondent. The application of this rule of law is elementary and requires no further discussion.

The sole issue before the Court as to the time that the restriction is to continue is whether or not its purpose has been terminated by the lapse of reasonable

time under the circumstances and facts of this case. The Appellants contend that it has not lapsed and the Respondent contends that it has, that its usefulness has been lost for the reasons heretofore announced. We believe that the findings of the trial court that the change in the neighborhood and the purpose of the covenant has been nullified was proper. The determination of this Court as to what is a reasonable time for this restriction to remain in full force and effect was not before the court for determination and should not be considered by this Court.

## SUMMARY

This Court's decision should be reviewed for the purpose of determining whether or not this action comes within the purview of the prior holdings of this Court that actions to quiet title are to be considered as actions at law and not actions in equity, and to clearly establish whether or not this action falls within that line of cases which requires the application of the rule of evidence requiring that the findings be supported by clear and convincing evidence.

We respectfully urge this Court to reconsider its decision and afford counsel the opportunity of presenting these matters in oral argument. The error is too obvious to permit of serious doubt. Respondent is entitled to an affirmance of the decree and judgment rendered by the trial court in this action.

**Respectfully submitted,**

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